United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1908.

No. 1889. 555

JOSEPH T. FERRY AND J. FRANK FERRY, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF JAMES FERRY, APPELLANTS,

vs.

GEORGE HENDERSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED APRIL 3, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1908.

In the Court of Appeals of the District of Columbia.

No. 1889.

JOSEPH T. FERRY ET AL., Trustees, &c., Appellants,
vs.
GEORGE HENDERSON.

a Supreme Court of the District of Columbia.

At Law. No. 49692.

GEORGE HENDERSON, Plaintiff,
vs.
JOSEPH T. FERRY and J. FRANK FERRY, Trustees under the Last Will and Testament of James Ferry, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

1 *Declaration, &c.*

Filed July 30, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49692, Docket No. —.

GEORGE HENDERSON, Plaintiff,
vs.
JOSEPH T. FERRY and J. FRANK FERRY, Trustees under the Last Will and Testament of James Ferry, Defendants.

1. The plaintiff sues the defendants for money payable by the defendant- to the plaintiff for *money payable by the defendants to the plaintiff for* goods bargained and sold by the plaintiff to the defendants; and for goods sold and delivered by the plaintiff to the defendants; and for work done and materials provided by the plaintiff for the defendant- at their request; and for money lent by the plaintiff to the defendants; and for money paid by the plaintiff for the defendants at their request; and for money received by the defendants

for the use of the plaintiff; and for money found to be due from the defendants to the plaintiff on accounts stated between them.

And the plaintiff claims fourteen hundred dollars ($1400.00) with interest at the rate of 6 per cent. per annum from the 17th day of July 1907 until paid according to the particulars of de-
2 mand hereto annexed, besides costs of this suit.

CHAS. POE,
Attorney for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

CHAS. POE,
Attorney for Plaintiff.

Affidavit.

CITY OF WASHINGTON, *District of Columbia, To wit:*

George Henderson swears that he is the plaintiff named in the declaration to which this affidavit is attached, and which is referred to and made a part of this affidavit; that the plaintiff's cause of action therein is an account for fourteen hundred dollars due by the defendants to him for services rendered by him at their request in overseeing, superintending and directing the construction of the Calumet Apartment House, managing the finances of said operation, in obtaining the contracts from material men and others, protecting the property from liens, and protecting and looking after the interests of the defendants, while they were engaged in the above
3 enterprise; affiant further swears that the amount claimed by him is a fair and reasonable compensation for the services rendered by him to the defendants and that the sum of fourteen hundred Dollars ($1400.00) with interest, as therein claimed, is justly due and owing to the plaintiff from the defendants by reason of the premises, exclusive of all set-offs and just grounds of defense.

GEORGE HENDERSON.

Subscribed and sworn to before me this 30th day of July 1907.
[SEAL.]

M. S. W. DAY,
Notary Public.

Pleas and Affidavit.

Filed September 3, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49692.

GEORGE HENDERSON, Plaintiff,
vs.
JOSEPH T. FERRY and J. FRANK FERRY, Trustees under the Last Will and Testament of James Ferry, Defendants.

For pleas to the plaintiff's declaration the defendants say:

First. That they did not promise in manner and form as
4 therein alleged.

Second. And for a further plea they say that they are not indebted to the plaintiff as in said declaration is alleged.

GEO. FRANCIS WILLIAMS,
Attorney for Defendants.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, the undersigned official, JOSEPH T. FERRY and J. FRANK FERRY, who being by me first sworn in due form of law, make oath as follows:

They are the defendants named in the above-entitled suit, in which they have filed pleas, which are hereunto annexed. They deny the right of the *defendant* to recover against them the amount claimed by him in his declaration, or any sum whatever, either in their capacity as trustees under the last will and testament of their deceased father James Ferry (in which capacity they are sued) or as individuals. The grounds of their defense to his said claim are briefly that, neither as trustees of the will of James Ferry nor as individuals, did they or either of them request the plaintiff to oversee, superintend or direct the construction of the Calumet Apartment House mentioned in his affidavit in the above-entitled cause or to manage the finances of said building operation, nor did the plaintiff in fact oversee, superintend or direct such construction or manage the finances of the operation. While it is true that he did
5 perform some other services in connection with the construction and finishing of said apartment house and secured signatures to release of liens in the premises, yet the fact is, as the affiant Joseph T. Ferry, who had all of the dealings with said plaintiff in the premises, alleges of his personal knowledge, and the said J. Frank Ferry alleges on information and belief, that he, the plaintiff, offered voluntarily to perform such services and did perform them without any agreement or promise, express or implied, on the part of the defendants as trustees or individuals, or on the part of either of them, to pay or compensate him for the same, the plaintiff stating in substance that he hoped or expected to engage in building operations, from which statement said Joseph T. Ferry understood that he desired the experience which he would receive from assisting in and about the said construction in the matters in which he rendered services as aforesaid, and otherwise giving said Joseph T. Ferry to understand by his conduct and by silence as to any compensation, and hence he did understand, that his services were being rendered without any intention of charging for the same or any expectation of receiving payment for the same.

Defendants further state that they employed and paid an architect to supervise or superintend the erection of said apartment house, as well as a foreman to superintend and direct the actual work of construction; that the plaintiff had no special technical knowledge or experience relative to building but, on the contrary, he was and for a number of years had been employed in a clerical capacity by the real estate agent who then and for many years previous
6 thereto had the charge and management as agent of a large number of improved properties belonging at that time to the

estate of the said James Ferry, formerly to the said James Ferry in his lifetime or to his deceased wife Mary A. Ferry in her lifetime; and that it was known to the plaintiff that the defendants intended to place the rental of the apartments in the Calumet apartment house in the hands of the said employer of plaintiff, which, as they understand, was an additional reason inducing him to render services without charge in connection with the said building operation and, as a matter of fact, the defendants did place the apartment house in charge of the real estate office in which said plaintiff was and is employed for the purpose of rental and the same continues to be in the charge of said office where plaintiff is employed.

Defendants, referring to the statement in plaintiff's affidavit that his cause of action is an *account* for fourteen hundred dollars ($1400) etc., say that if the plaintiff kept any account in which he charged the defendants for services, they have no knowledge of any such account and, indeed, were never informed by him until the month of May or June last past that he intended to make any claim whatever against them for payment for his services, although the said apartment house was finished and one of the apartments rented and occupied in the month of December, 1905.

Defendants further call attention to the fact that, although the plaintiff's declaration refers to particulars of demand as being thereunto annexed, yet no particulars of demand are annexed to
7 the declaration on file in this cause or to the copies thereof issued to defendants and, if the said plaintiff has kept any account against them in which he has itemized his said alleged services, they call for the production of the same and the filing of the same as a bill of particulars or particulars of demand in this cause, in order to enable them the better to prepare for the trial of this case.

In conclusion, defendants state that said Calumet apartment house is the property of the estate of James Ferry, of whose will they are trustees, and that there are a number of persons beneficially interested in said estate to whom they must account for outlay or expenditure in reference to the property of the estate, and that in the construction of said building they were careful to avoid any unnecessary expense to the estate and would not have allowed the said plaintiff to perform any services in reference thereto for which they understood he intended to charge without having first made a contract as to the amount to be charged by him, and they say that even if plaintiff were entitled to charge for his services (which they again deny) the sum of one hundred dollars ($100) would be a liberal compensation, in their judgment and belief, for all the services rendered by him.

Further affiants say not.

JOSEPH T. FERRY.
J. FRANK FERRY.

Subscribed and sworn to before me this 31st day of August, 1907.

[SEAL.]

BURR N. EDWARDS,
Notary Public, D. C.

8 *Replication.*

Filed September 6, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49692.

GEORGE HENDERSON
vs.
JOSEPH T. FERRY ET AL.

The plaintiff joins issue on the defendants' pleas.

CHAS. POE,
Attorney for Plaintiff.

Bill of Particulars.

Filed November 26, 1907.

At Law. No. 49692.

GEORGE HENDERSON
vs.
JOSEPH T. FERRY ET AL., Trustees.

The defendants are indebted to the plaintiff for ten (10) per centum of the cost of the construction of the building erected on part of lot numbered six (6) in Square numbered Seven hundred and eighty-six (786); said lot being the northeast corner of
9 Third and East Capitol Streets, and the improvements thereon being known as the "Calumet" Apartment House, erected at a cost of $20,000..... $2,000.
Less the amount paid the Architect for his services..... 600.

$1,400.

This charge is for superintending the construction of said building which necessitated daily visits of the plaintiff for a period extending over six months; the obtaining of estimates from contractors and material men before the construction of the building was commenced, the hiring of foremen and carpenters during the course of construction; making the weekly payment of wages to the carpenters and laborers, and making various payments to the different contractors and material men as the work progressed.

The procuring of a release of mechanics' liens from all contractors and material men who did work on, or furnished material for said building; said release of liens being procured at the request of the defendants at a time when there was money due nearly all the contractors and material men in order to enable the defendants to draw

the final payment on the loan which was secured before building operations were begun. The signatures of the contractors and material men to said release of liens were obtained by the plaintiff upon his assurance, and personal liability that they would receive a final and satisfactory settlement from the defendants.

10 For the services of an attorney in obtaining from the Inspector of Buildings permission to erect a nine (9) inch wall on the south half of the east line of said part of lot Six (6), instead of a thirteen (13) inch wall, as had been previously ordered by the said Inspector of Buildings. Said part of lot Six (6) having a frontage of but a little over twenty-two (22) feet on East Capitol Street, which frontage, after deducting the thickness of walls, was to afford the width of two rooms, it was of material importance to the defendants to save all the space possible, even to inches. The east portion of said lot Six (6) is improved by an old three-story brick building, the west wall of which was declared by the Inspector of Buildings, not to be a party wall; the defendants not wishing to erect a thirteen (13) inch wall wholly on their lot, were desirous of having the west wall of the adjoining building taken out, and a party wall erected in its place, for which they were willing to pay the whole cost. The owner of the adjoining building being a non-resident, the plaintiff obtained the consent of his agents to remove said wall, providing satisfactory arrangements could be made with the lessee of said building. When the matter was taken up with the said lessee, he demanded a payment of $500 in cash, for the inconvenience, annoyance and damage which would be caused by having said old wall removed. The defendants authorized the plaintiff to offer said lessee a max-

11 imum sum of $250 in cash, and to agree to have his carpets taken up, and with his parlor furniture and piano, removed to a place of safety, and when the work was complete, to replace them in as good condition as before removal. This offer having been made to said lessee by the plaintiff personally, and by his attorney, and being declined, the plaintiff thereupon, acting wholly for and in the best interests of the defendants, agreed to pay his attorney a fee of $100, if he could obtain the consent of the Inspector of Buildings to allow the defendants to erect a nine (9) inch wall instead of a thirteen (13) inch party wall, as previously ordered and insisted upon. The plaintiff's attorney was successful in his efforts, and thereby saved the defendants considerable money, and gained for them additional space, every inch of which was valuable. The plaintiff therefore claims that he should be reimbursed the fee paid out of his own funds to his attorney ..... $100.

For the amount paid by the plaintiff to the contractors for excavating, concreting and cement work, said amount to be in final settlement of their claim, which had been assured them by the plaintiff when he obtained their signature to the release of mechanics' liens, said payment amounting to..... $50.

The plaintiff having found that it would subserve the interests of the defendants for him to be at the building early in the mornings,

at or about the time the mechanics started work, made it a
12 point to be there, thus necessitating his obtaining breakfast away from home, generally after he had been to the building and returned to his office, as is well known by the defendants.

For amounts paid out by the plaintiff for breakfasts, car fare and telephone messages, amounting approximately to.... $50.

All of which services and payments were rendered and made by the plaintiff at the request of the defendants.

Memorandum.

February 4, 1908.—Verdict for Plaintiff for $900, without interest.

Supreme Court of the District of Columbia.

FRIDAY, *February* 14, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 49692.

GEORGE HENDERSON, Pl't'f,

vs.

JOSEPH T. FERRY and J. FRANK FERRY, Trustees under the Last Will and Testament of James Ferry, Def'ts.

Upon hearing the defendants' motion for a new trial, it is considered that the same be and hereby is overruled, and judg-
13 ment on verdict ordered.

Therefore it is considered that the plaintiff recover against the defendants Nine hundred dollars ($900.) without interest, being the money payable by them to the plaintiff, by reason of the premises, together with his costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendants note an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on said appeal to act as a Supersedeas, is hereby fixed in the sum of Eighteen hundred dollars ($1800.).

Memorandum.

February 19, 1908.—Supersedeas bond approved and filed.

Supreme Court of the District of Columbia.

FRIDAY, *March* 20, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 49692.

GEORGE HENDERSON, Pl't'f,
vs.
JOSEPH T. FERRY ET AL., Def'ts.

Now come here the defendants by their Attorneys and pray the Court to sign, seal and make part of the record, their bill of exceptions taken during the trial of this cause, now for then, which is accordingly done.

14 *Bill of Exceptions.*

Filed March 20, 1908.

In the Supreme Court of the District of Columbia.

No. 49692. At Law.

GEORGE HENDERSON
vs.
JOSEPH T. FERRY and J. FRANK FERRY, Trustees of the Will of James Ferry.

Be it remembered that in the trial of this cause the plaintiff to maintain the issues on his part joined and testifying in his own behalf gave evidence to the jury tending to prove that he is, and was during the time covered by the occurrences hereinafter recited, employed as a clerk and book-keeper in the office of Robert E. Bradley, a real estate broker and agent in the City of Washington; that he has known the defendant, J. Frank Ferry, for fifteen years, and Joseph T. Ferry seven or eight years; that early in the year 1905 Joseph T. Ferry discussed with witness the advisability of building an apartment house upon a lot held by him and his brother as trustees under their father's will, and situate at Third and E. Capitol Streets, and in the latter part of April he decided to build. Mr. A. M. Schneider was engaged as architect; he was also to get estimates; witness was also requested to obtain estimates and did so, and most of those he got were accepted by Mr. Joseph T. Ferry to whom the witness showed the lowest estimates obtained by him for each branch of work.

15 And plaintiff further testified that before all the estimates were obtained Joseph T. Ferry left the City, this being in the early part of May, 1905. Estimates were forwarded to him by plaintiff and after their submission witness received a letter which was duly proved, and read in evidence as follows:

BROOKLYN, N. Y., *June* 11, 1905.

DEAR MR. HENDERSON: Yours enclosing estimates indicating the probable cost of the building is received. It is somewhat higher than I expected from Schneider's recent statements to me that the

estimates he had received showed that he could get the work done at the figure previously mentioned by him, namely, $16,000.

I think, however, that it will pay to have the building put up, even at the figures given, and the first thing to do will be to see if we can get a loan from a Bldg. Asso. for $15,000 at 6%. It might be well to inquire of the Columbia and Real Estate Title Co. if they are attorneys for any Bldg. Asso. If so, it would probably be preferable to obtain the money from such Asso., if possible, as any controversy as to the title would perhaps be thus avoided and the certificate could be used in changing the loan after the building is up. If the loan is agreed upon, it would not be necessary to wait until the papers are drawn up before starting with the work, as Frank has enough money on hand for such purpose.

I think it would also be best after the loan is obtained to let out the contracts for only such of the work as is now necessary to be given out, such as the excavating, trenches, footings, and perhaps the brickwork, ironwork and stonework; *further efforts to be made to secure lower bids for the rest.*

I notice Sorrell's bid for the brickwork does not include merchantable brick, but does include the underpinning, while Wilson's bid includes merchantable brick, but does not cover the underpinning. I do not know what is meant by merchantable brick, but I believe you said the adjoining owner would have to bear the expense of the underpinning.

In regard to the coping and driveway, it was my intention
16 to endeavor to have the District lay a cement sidewalk on Third Street, as far as our property ran, and they would then fix the grade. The driveway taken by itself would not cost much, and I think the tone it would give to the building would amply repay the expense of placing it.

I think it would be well, however, to get a couple of estimates say from Fahey and Joyce of the cost of the excavations, trenches and concrete footings, also the piling up of the material and cleaning the brick. Having already these items in their estimates, they should be able to give you the cost of them without much trouble.

If it is not asking too much, I would like to have a letter from you tomorrow night, so that it will reach me Tuesday morning.

Yours sincerely, JOSEPH T. FERRY.

And plaintiff, further testifying, gave evidence tending to prove that at the time Mr. Ferry went away as aforesaid there was a question as to the East wall of the building; Mr. Ferry desired that the West wall of the adjoining building be taken down and a thirteen (13) inch party wall built on the line between the properties. This effort failed and Mr. Ferry then desired to get permission from the Inspector of Buildings to put up a nine inch wall wholly on his own premises instead of a 13 inch wall. The architect was working at this, and, before he went away, Mr. Ferry told witness to do the best he could. While Mr. Ferry was away from the City witness had a conversation with him, by telephone, about the building; witness asked Ferry, "Joe, what do you want me to do?" and Ferry answered,

"I want you to go ahead just as though that building was your own."

After that witness employed an attorney in the matter of the
17 wall and paid him $100.00 for his services. Never mentioned this to Mr. Ferry at any time. The building was put up under contracts with mechanics in different lines of work, except as to the carpenter work, which was done by men employed by the day, working under a foreman who engaged the men and who was himself engaged by the witness for this work.

And witness further testified that during the erection of the building he was there once every day, sometimes twice or three times a day; and on every Sunday; witness was usually there when the men went to work, about half past seven or a quarter to eight, a. m. It took about six months to construct the building. The foreman was the only man plaintiff employed. The foreman and carpenters were paid by plaintiff, who on Fridays got the pay roll from the foreman. When money was due the contractors they notified plaintiff who notified Mr. J. T. Ferry who gave plaintiff his checks for the persons entitled. All payments on account of said building while the work was in progress were made on plaintiff's oral statement that the work had been done or materials furnished sufficient to make defendants liable for such sums.

When the building was nearly completed plaintiff at request of defendant, Joseph T. Ferry, procured releases of liens from the material men and contractors, about twenty in number. His early visits to the building necessitated plaintiff getting his breakfasts away from home, and witness estimated that for these and for car fare and telephone calls he expended about $50.00. The release of

liens referred to was produced and given in evidence on be-
18 half of plaintiff.

And plaintiff testified that in his opinion his services were reasonably worth ten per cent. on the cost of the building, and that Mr. Ferry had told him it cost $20,000.00. The contract fee of the architect, Mr. Schneider, for his services was $600.00. He, plaintiff, had concluded to deduct that amount and hence claimed $1400.00.

And further the witness testified, that during the erection of the building his conferences with Joseph T. Ferry were frequent—almost daily—and usually about five o'clock they would either meet and go to the building together, or would meet at the building. The workmen stopped work at four or half past four o'clock.

And upon cross examination, that during the time in question he was employed by Robert E. Bradley and was paid a salary for conducting his rent business, and shared commissions on any sales, loans or exchanges; usually gave from nine o'clock a. m. to five o'clock p. m. to Mr. Bradley's business, but had no fixed hours. And thereupon the plaintiff was asked by counsel for defendant- what was his salary, to which question counsel for plaintiff objected, and the Court sustained such objection and the witness did not answer the question; and to such ruling of the Court counsel for defendant- then and there duly excepted, and prayed the Court to note such exception upon the minutes, which was done.

And plaintiff further in cross examination testified that he had no

technical knowledge of building or of architecture, and had never superintended an entire building with the exception of the
19 one in question, but had considerable to do with repairs to buildings, and on one occasion for a month looked after the building of a row of houses, while his brother, a builder, was away, but charged nothing for it.

Witness further testified that his relations with Joseph T. Ferry were very intimate before the building was undertaken; that before the building was started a building loan was obtained, and witness received a part of the brokerage paid therefor. And further testified that the defendants were trustees for a number of properties, the rents from which, prior to the building and at the time thereof were collected through Mr. Bradley, his employer, but there was no agreement that the rents from this building should be so collected.

The foreman and carpenters on this building were paid, in part by Mr. Ferry's orders out of the rents coming through Mr. Bradley, and such payments were charged against the defendants on Mr. Bradley's statements rendered them, which were prepared by witness. Money obtained on the building loan as the work progressed was paid directly to the defendants. Witness kept no account for or with defendants, except the account of rents collected and disbursements therefrom kept on Mr. Bradley's books. Each week witness would tell Mr. Ferry what money was needed to pay the wages; if the rents in the office were sufficient he (Ferry) would order that they be so applied. "He (Ferry) had a right to order the disbursement of his rents any way he saw fit." Witness kept the rent
20 accounts for Mr. Bradley and the payment of the rents to the persons entitled was part of his duties (p. 58). And further testified that during all the visits he made the building he gave no orders to the foreman or any other person; that the foreman was an experienced builder and was paid one dollar per day extra wages, but not as superintendent. The architect visited the building, but how often witness did not know. Witness suggested to J. T. Ferry and the foreman a change in the floor plan, which was accepted. Witness on cross-examination further testified that he considered himself superintendent of the building.

Witness claims to have been first employed by Mr. Ferry when he was told to get the estimates. Did not tell Ferry he would charge him anything. Mr. Ferry returned to Washington about the latter part of July, when the first floor joists were on, and remained thereafter. Witness's visits to the work in the morning were from half an hour to three quarters of an hour long. Witness tried to reach his office by nine o'clock. Witness kept no account of his outlays for breakfasts, car fares and telephone calls, and made no estimate thereof until just before bringing his suit. And further testified that until just before bringing suit, he made no request or demand on the defendants, or either of them, for payment for anything, or gave them any information that he had a claim against them. The building was finished in January, 1906, although one tenant moved in in December, 1905.

And further testified that the material for the carpenter work was

all ordered through him by the foreman, witness giving the
21 orders to the material men. The foreman communicated with the witness by telephone.

And further testified that from the time of the completion of the building, money for the defendants, as trustees, to the amount of $400.00 monthly, was passing through his hands as clerk for Mr. Bradley in the form of rents; that he made no demand for payment of anything until June, 1907 after a break in the friendship between himself and Joseph T. Ferry, though from a time immediately after the releases were obtained in January, 1906, witness felt he had been treated badly.

And on re-direct examination said plaintiff testified that he was making no claim for book-keeping or for disbursing any money.

And plaintiff gave in evidence the testimony of eleven other witnesses, being contractors on said building tending to prove that he had visited the said building frequently during the erection thereof; that he had ordered materials for the carpenters from time to time, that he had disbursed money in payment of the foreman and carpenters and delivered the checks of the trustees, defendants herein, to the several contractors, and had also obtained the signatures of some of such contractors to the release of liens on said building.

And said plaintiff called as a witness one NICHOLAS T. HALLER, who testified in substance that he had for twenty-four years pursued the calling of an architect in the City of Washington, and knew the usages of builders and the compensation usually paid to superintendents in the construction of buildings, and being asked
22 what was a fair compensation for such superintendence answered, ten per cent. of the cost; and further testified that such a superintendent need not be experienced in building, or remain practically all the time upon the building, but needed only to understand the plans and specifications, and that a part of the duties of such superintendent would be to order materials.

And the plaintiff called as a witness one EDWARD A. JOHNSTON, who gave testimony tending to prove that he was the foreman in charge of carpenters upon the said building; that he hired the carpenters and paid them off, getting the money from the plaintiff after giving him the pay-roll, and that witness was upon the building all the time every day from a quarter past seven until sometimes as late as five o'clock in the evening; that the plaintiff was frequently at the building in the mornings, and that on one occasion the plaintiff came to the building and said he was not satisfied with what the carpenters were doing, and thereupon plaintiff ordered witness to discharge these men and the witness put the men off and himself resigned from the work. The building was then nearly completed.

And on cross-examination the witness testified in substance that before being employed upon this work he had been engaged many times as superintendent of buildings, and specified a number which he had thus superintended; and thereupon counsel for the defendant asked the witness, "Are you familiar with working plans and speci-

fications?" Whereupon the Justice presiding asked, "What is the purpose of this line of evidence?" To which counsel for the
23 defendant responded, "The purpose is to show that there was a man in charge of the building who had the qualifications necessary to superintend—such as described by Mr. Haller for instance, and even perhaps more so—thereby rendering it unnecessary to have another superintendent." Whereupon the Justice presiding ruled out the question and refused to allow the witness to answer. To which ruling counsel for the defendants then and there duly excepted. And the witness further testified that his compensation upon this particular building was $5.00 per day, or $1.00 a day more than the carpenters' wages, and that this was paid him for his extra work in looking after the building and for his experience etc.

And here the plaintiff rested; this being in substance the testimony in his behalf.

And thereupon the defendants, to maintain the issues on their part joined, offered evidence tending to prove that they, nor either of them, had ever employed the plaintiff to perform services for them in connection with said building, and that they, nor either of them, had any knowledge or information that for the interest taken by the plaintiff in the said building any claim for compensation would be made by him until June 1907, and that the plaintiff and said Joseph T. Ferry were intimates and associates before and during the time of such building, and defendants ascribed to this friendship and to other causes the plaintiff's interest in the building. And further gave evidence tending to prove that the plaintiff did not exercise any authority about said building, and was not known even by sight to some of the contractors thereon, and that the overlooking of
24 the carpenters was done by the foreman, and the work of superintendence was done by the architect, who visited the premises daily; sometimes twice a day. And further gave evidence tending to prove that until the bringing of the suit defendants were not informed that plaintiff had employed an attorney in the matter of the building of the East wall, or that he had paid any money in their behalf.

And further gave evidence tending to prove that the telephone conversation between Joseph T. Ferry and the plaintiff, referred to by the plaintiff, had no relation to the matter of the said work of building, but was in relation to the raising of a building loan; that before said building was completed a sign was put up referring applicants for apartments to Robert E. Bradley, and that said Bradley has since then collected the rentals from said building.

And defendant offered further evidence tending to prove that there was no usage or custom in the City of Washington for the payment of building superintendents by giving a percentage upon the cost of the building.

And defendants called as a witness JOSEPH RICHARDSON, who gave testimony tending to prove that he is by occupation a builder and has been so engaged for twenty years in the City of Washington, and has

constructed a great many buildings, and is familiar with the work of superintendents of buildings and their usual compensation, and that their pay is usually about six dollars a day. And thereupon counsel for the defendants asked the witness, "What are the qualifications of a man in that work entitled to claim $6.00 a day?", to which question counsel for the plaintiff objected, and the Court sustained such objection and refused to permit the witness to answer; to which ruling the defendants by their counsel then and there duly excepted.

And thereupon counsel for the defendants asked the witness, "To earn $6.00 a day, or to be entitled to that in the building trade as a superintendent, how much time should the superintendent spend on the building?", to which question counsel for plaintiff objected, and the Justice presiding sustained such objection and refused to permit the witness to answer; to which ruling counsel then and there duly excepted.

And said witness further testified that the duties of a superintendent are to see that the work is properly carried out, that the building is properly constructed and the plans and specifications adhered to. And thereupon the witness was asked, "To do that properly how much of the time of the superintendent would be necessary?", to which question counsel for the plaintiff objected, and the Court sustained such objection, and refused to permit the question to be answered; to which ruling counsel for the defendant then and there duly excepted.

And thereupon counsel for the defendants asked the witness, "What in your opinion would be the reasonable compensation of a man as superintendent of a building who should spend from half an hour to one hour a day on the building?", to which question counsel for the plaintiff objected and Justice presiding sustained such objection, and refused to permit the question to be answered; to which ruling counsel for the defendants then and there duly excepted.

26 And defendants' counsel further asked the said Richardson whether he had had experience in obtaining releases of liens for the owner from material men and contractors, to which he replied: "Yes, sir," whereupon defendants' counsel asked the following question, namely: "Can you give an estimate or opinion as to the value of services of one who obtains say twenty releases from mechanics and from material men—twenty signatures to one release?"—to which question plaintiff's counsel objected and the Court sustained the objection and would not permit the witness to answer, to which ruling of the Court defendants, by their counsel, then and there duly excepted.

And thereupon the defendants called one THOMAS F. HOLDEN, who testified that he is a mechanical and architectural draftsman and superintendent of the gas-works, and has acted as an architect and as architect supervised and made plans for a number of buildings mentioned by him in the City of Washington "and numerous other flats and dwellings," and is familiar with the work of persons

who superintend the construction of buildings; that he has charge of all that work (superintending construction of buildings) for the Washington Gas-Light Company; that persons who act as superintendent while a building is being erected are as a rule paid by the day at a rate fixed according to the class of the building, such rate being, according to his experience, five dollars per day in the case of a building to be used as an apartment house costing about $20,000; and being asked what are the duties performed by such superintendent, answered that they start at the foundation and con-
27 tinue as superintendent until the keys are turned over to the owner; they have general charge of the construction work but do no actual manual labor, "just direct the mechanics as to their work, how it should be done," whereupon defendants' counsel asked the witness: "What qualifications are necessary for such superintendents?" to which question counsel for plaintiff objected, and the Court sustained the objection and refused to allow the witness to answer, to which ruling defendants, by their counsel, then and there duly excepted.

And thereupon defendants' counsel asked the witness the following question, namely:

"Q. Assuming that a man, in superintending as you have indicated, was not required, on account of the job not being a very large job, to give his whole time to the superintendence, but only to come in the mornings for a short time, and then again in the evening for a short time, and not always in the evening, and occasionally at some time during the day, but did not stay there all the time—would he be entitled to the full pay of a superintendent, five dollars a day?" to which question counsel for plaintiff objected and the Court sustained the objection, and would not permit the witness to answer the question, to which ruling of the Court the defendants, by their counsel, then and there duly excepted.

And thereupon counsel for the defendants asked the witness whether he had had experience in obtaining releases of mechanic's liens in the case of a building loan being on the property, to which he replied in the affirmative, whereupon defendants' counsel
28 asked the witness the following question: "Can you give any estimate or opinion as to the value of services of a man who draws up a release of liens on a blank and gets it signed by materialmen and others on his representations?" to which question counsel for plaintiff excepted and the Court sustained the objection, and would not allow the witness to answer the question, to which ruling of the Court the defendants, by their counsel, then and there duly excepted.

And here the defendants rested, this being the substance of all the testimony in their behalf; and no further evidence was given.

And thereupon the Justice presiding granted to the plaintiff two prayers for instruction to the jury, and the same were read to them, as follows, namely:

(First) If you believe from the evidence that the defendants requested the plaintiff to do the work referred to in the evidence and to lay out and expend the money therein referred to, and have not

paid him, then your verdict should be for the plaintiff for such amount as his services are reasonably worth, as well as for such sums of money, if any, as you may believe from the evidence the plaintiff laid out for the defendants, at their request.

(Second) If you believe the defendants requested the plaintiff to do the work referred to in the evidence, then the burden of proof is upon the defendants to show that the plaintiff agreed to do such work without being paid therefor.

To the granting of the second of said two prayers and the
29 giving of the same to the jury, the defendants by their counsel then and there duly excepted.

And at the request of counsel for defendants the Court gave the following instructions:

To entitle the plaintiff to recover for services rendered by him to the defendants he must have established by a preponderance of the evidence that at the time he rendered such services he intended to make a charge therefor and expected to be paid therefor, and if the jury shall find from the evidence that at the time the services were rendered the plaintiff did not intend to make a charge therefor against the defendants, and that such purpose to make a charge originated after all such services had been rendered, the verdict should be for the defendants.

It will not be sufficient to entitle the plaintiff to recover that he shall have proved that he rendered service to the defendants, but he must also have established by a preponderance of evidence that such services were rendered under such circumstances as fairly to raise the inference that the defendants, or one of them, knew or should have known that such services were to be paid for, and if the jury shall find that neither of the defendants knew that such services were to be charged for, and that they believed they were gratuitously rendered, and further find that the course of conduct of the plaintiff was such as to reasonably cause such belief in the defendants, the verdict should be for the defendants.

And thereupon the Justice presiding by a general charge
30 instructed the jury as follows:

Gentlemen of the jury, you will first look into the evidence upon the point of what correspondence passed between the parties, as well as what conversation they had with each other, with a view of determining whether or not from the correspondence and the verbal conversation, taken together, there appears a mutual intent that the services to be performed by Henderson should be paid for. If from the conversation and the correspondence you find that the existence of a mutual intent to pay for the services should be fairly inferred, that would amount to a contract to pay the reasonable value of the services. But, if after considering both the correspondence and the conversation you find that in them there is not that which shows fairly the expression of a mutual intent to pay Henderson for his services, then you must look not only at the conversation and the letters, but at all the other evidence in the case, including the nature, the amount and the character of the services, and including as well

as that the social relations that maintained at the time between these parties, as well as their business relations, and ascertaining from all those facts and circumstances whether or not men who are in the business and social situation that these two were in, when one of them performs for the other such services as Henderson performed in this case, usually pay for those services. If you find that men so circumstanced, one of them having rendered to the other such services as these, usually pay for them, then in this case the law would presume that the defendant and the plaintiff intended
31 that they should be paid for, and that finding should govern your deliberations unless all the evidence in the case raises up proof that in this particular case they did not intend that there should be pay.

If you find in either of those ways the existence of a mutual intent between the parties that the services should be paid for, the plaintiff would be entitled to recover against the defendant. If you find him entitled to recover then you must proceed to determine from the evidence what services Henderson rendered and what was the fair and reasonable value of those services, and allow the plaintiff that sum. It cannot in any event exceed the amount claimed in his declaration, because no one can have more than he claims.

The alleged item of the payment of $100 to Jones for attorney fees may be regarded by you in either of two aspects provided you find that such a payment was made. If you find it was made then you may consider that as one of the items of services rendered by the plaintiff to the defendants, and include the value of that service—not the money paid but the value of the service—in your estimate of the value of the total services. If, however, you find that the total services rendered by Henderson is not as much as he claims, not $1,400, then, if you see fit, you may consider the alleged $100 item in another aspect. That is to say, if you find his services were all worth less than $1,400, then you are entitled to consider in addition to that whether or not he paid out $100 in cash of his own, with which Ferry is chargeable in addition to the
32 value of the services. In that aspect of the case, whether or not Ferry is chargeable with $100 paid out for attorney fees by Henderson on Ferry's account, would depend on whether or not the employment which Ferry committed to Henderson carried with it authority to employ an attorney for this especial matter of the party wall, and carried with it authority to pay that attorney. If it did, under that aspect of the case, you might allow that $100 item if you saw fit; but unless the employment by Ferry of Henderson was so broad as to include in it power to employ and pay an attorney, then you cannot allow that $100 as an item paid out on Ferry's account.

To which charge no exceptions were reserved by either party.

Wherefore, in order that the foregoing matters and things which would not otherwise appear of record may be made so to appear, the attorneys for defendant pray the Court to sign and seal this bill of exceptions, which has been settled by agreement of attorneys for both parties, and the same is accordingly so signed and sealed by the

Court and made of record in this cause *nunc pro tunc* on this 20th day of March, A. D. 1908.

DAN THEW WRIGHT, [SEAL.]
Associate Justice of the Supreme Court of the District of Columbia.

Settled by agreement of attorneys.

CHAS. POE, *Att'y for Pl'ff.*
GEO. FRANCIS WILLIAMS,
Att'y for Def'ts.

March 20, 1908.

33 *Directions to Clerk for Preparation of Transcript of Record.*

Filed March 23, 1908.

In the Supreme Court of the District of Columbia

At Law. No. 49692.

GEORGE HENDERSON
vs.
JOSEPH T. FERRY and J. FRANK FERRY, Trustees of the Will of James Ferry.

To the Clerk of Court:

Please prepare transcript of record on appeal in the above entitled cause as follows namely:

Declaration.
Particulars of Demand.
Pleas.
Joinder of Issue.
Memo. of verdict.
Memo. of motion for new trial and that same was overruled. Judgment.
Memo. of noting of appeal in open Court and fixing amount of bond to operate as supersedeas.
Memo. of approval and filing of appeal bond.
Bill of exceptions.

GEO. FRANCIS WILLIAMS,
A. A. BIRNEY,
W.
Attorneys for Defendants.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49692 At Law, wherein George Henderson is Plaintiff and Joseph T. Ferry, *et al.,* Trustees, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 2nd day of April, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1889. Joseph T. Ferry *et al.,* trustees, &c., appellants, *vs.* George Henderson. Court of Appeals, District of Columbia. Filed Apr. 3, 1908. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED
MAY 6 1908
Henry W. Hodges,
Clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1908.

No. 1889.

JOSEPH T. FERRY AND J. FRANK FERRY, TRUSTEES, APPELLANTS,

vs.

George Henderson.

BRIEF FOR APPELLANTS.

GEORGE FRANCIS WILLIAMS,
ARTHUR A. BIRNEY,
Attorneys for Appellants.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1908.

No. 1889.

JOSEPH T. FERRY AND J. FRANK FERRY, TRUSTEES, APPELLANTS,

vs.

GEORGE HENDERSON.

Statement.

The appellee, George Henderson, sued the appellants upon the common counts, claiming $1,400, with interest from July 17, 1907. His affidavit averred that his suit was for services rendered—

> "in overseeing, superintending and directing the construction of the Calumet Apartment House, managing the finances of said operation, in obtaining the contracts from material men and others, protecting the property from liens, and protecting and looking after the interests of the defendents while they were engaged in the above enterprise." (Rec., p. 2.)

The defendants pleaded the general issue, denied all liability, and their affidavit averred in substance that the services of plaintiff were voluntary and in his own interest, or the interest of a real estate agent by whom he was employed; that he had no technical knowledge

of building, and was not employed in the matter (Rec., pp. 3, 4).

By his bill of particulars, afterward filed, plaintiff claimed 10 per centum of the cost of the building, or $2,000, less $600 paid the architect (by appellants) for services, this charge of $1,400 being explained to be for (*a*) superintending the construction of the building; (*b*) obtaining estimates; (*c*) hiring foreman and carpenters; (*d*) making weekly payments to contractors, carpenters, land laborers; (*e*) procuring release of liens; (*f*) payment of $100 to an attorney; (*g*) payment of $50 to excavating contractors; (*h*) amounts (estimated at $50) paid for breakfasts, car fares, and telephone messages.

On the trial it was shown that an architect and a foreman experienced in superintending buildings in course of construction were employed on the work; that there was no express employment of plaintiff in any capacity; that he was in regular employment as a clerk and bookkeeper in the office of a real estate agent who had the collection of rents for the defendants of a number of other properties, and in whose charge as rental agent the building in question was placed before its completion; that payments made by plaintiff were in course of his (plaintiff's) duty as such clerk (Rec., p. 11), and he abandoned the claim for compensation for disbursing moneys of the defendants (Rec., p. 12). He considered himself superintendent of the building, but gave no orders to any person (Rec., p. 11); kept no accounts for or with defendants, and no account of sums paid for breakfasts, car fares, and telephone calls. The building was finished in January, 1906, but plaintiff made no claim or request for payment for anything, or even informed defendants that he had a claim against them, until just before bringing suit, July, 1907 (Rec., p. 11), although $400 monthly of defendants' money was passing through plaintiff's hands as clerk to

his employer during all this period of about eighteen months. Plaintiff admitted that he had no technical knowledge of building or of architecture, and had never superintended the construction of a building. He had had "considerable to do with repairs to buildings," and on one occasion for a month "looked after the building of a row of houses while his brother, a builder, was away, but charged nothing for it" (Rec., p. 11). Plaintiff further admitted that he and the defendant, Joseph T. Ferry, were intimate friends before and during the construction of said building (Rec., pp. 10 and 11) and that afterward, shortly before he made his claim against defendants, a break occurred in that friendship (Rec., p. 12). In respect to the alleged payment by plaintiff of $100 to an attorney in connection with a party-wall controversy, he admitted he had no express authority to make the same, and that he never reported to the defendants or either of them that he had made such payment or asked reimbursement therefor (Rec., p. 10). No proof was given or admitted of the alleged payment of $50 to excavating contractors—item *g* in above summary of bill of particulars—and that item was eliminated from the case.

The defendants showed in general that the plaintiff was not employed by them in any capacity, that neither of them had any knowledge or information that the plaintiff had or would make a claim against them until June, 1907, that the entire construction of the building in question (a small apartment house) was superintended and looked after by an architect and a foreman regularly employed by them, and that plaintiff exercised no authority about the building. They then endeavored to show the usual earnings of the plaintiff, the necessary qualifications of one entitled to claim the alleged customary pay to superintendents, and the reasonable compensation of one who should do work which

the plaintiff claimed to have done, but the court ruled out the testimony.

A verdict for $900 for the plaintiff was rendered.

Assignment of Errors.

The court erred:

1. In refusing to allow the defendants to ask the plaintiff what was his salary as clerk to Mr. Bradley.

2. In refusing to allow the witness, Joseph Richardson, to answer each of the following questions:

> "What are the qualifications of a man in that work entitled to claim $6 a day?"
>
> "To earn $6 a day, or to be entitled to that in the building trade as a superintendent, how much time should the superintendent spend on the building?"
>
> "To do that properly, how much of the time of the superintendent would be necessary?"

3. In refusing to permit the witness, Joseph Richardson, to answer the following question:

> "What, in your opinion, would be the reasonable compensation of a man as superintendent of a building who should spend from half an hour to one hour a day on the building?"

4. In refusing to permit the witness, Thomas F. Holden, to answer the following question:

> "Assuming that a man, in superintending as you have indicated, was not required on account of the job not being a very large job to give his whole time to the superintendence, but only to come in the mornings for a short time, and then again in the evening for a short time, and not always in the evening, and occasionally at some time during the day, but did not stay there all the time—would he be entitled to the full pay of a superintendent, five dollars a day?"

5. In refusing to allow the witness, Thomas F. Holden, to state the qualifications necessary to a building superintendent or superintendent of construction.

6. In refusing to allow the witnesses, Richardson and Holden, to testify to the value of services in obtaining releases of liens from material men and mechanics.

7. In granting the second prayer for instructions asked in behalf of the plaintiff (appellee).

ARGUMENT.

The case presented only two propositions:

First. Was the plaintiff entitled to recover anything for his alleged services and alleged outlay of money?

Second. If entitled to recover at all what should be the measure of his recovery?

As the jury *may* have intended to include or cover in and by their verdict reimbursement or allowance for the sum of $100 alleged to have been expended by the plaintiff as an attorney's fee on defendants' account in the party-wall matter and $50 alleged to have been expended for car-fare, breakfast, and telephone messages, the question whether he was entitled to recover at all may be considered settled against appellants by the verdict, but the question whether he was entitled to recover anything *for his alleged services* remains open, because if the instruction complained of in the last assignment of error was erroneous, the jury may have been misled thereby into allowing $750 for services for which otherwise they would not have found the plaintiff entitled to recover.

The exclusion of the evidence asked under the second proposition involves all the other assignments.

The assignments of error will be discussed in their order.

I.

Plaintiff was claiming compensation at the rate of more than two hundred ($200) per month for services which occupied his time, as alleged, during a small part only of each day during a period of about six months. During the same period he was regularly employed in a real estate office as a clerk and bookkeeper and had charge of the rental department of that office, usually giving from 9 a. m. to 5 p. m. to the office business, although he had no fixed office hours (Rec., p. 10). The fact sought to be proved by asking the plaintiff to state the amount of salary he received during the period in question from his employer would have aided the jury in estimating the value of his time, an important factor in estimating the value of his services. In the absence of any express contract of employment or of qualifications rendering the plaintiff specially fit for the work he had assumed to undertake, the amount of salary he regularly received for his time and services, ought, it is contended, to have been allowed to be considered by the jury, as bearing upon the value he had a right to place upon his time and services when charging the same against the defendants. Assume, as counsel are informed the fact is, that the amount of salary received by plaintiff during the entire period covered by the building operations in question was less than half the amount he claims as compensation for services rendered defendants during the same period, although but a small fraction of his time was taken up thereby, and the importance to the defendants of the evidence excluded becomes apparent.

It is submitted that the ruling complained of was erroneous and deprived defendants of a point which they had a right to urge in support of their contention that the plaintiff's claim was excessive.

II.

The three questions referred to under the second assignment of error which the witness, Joseph Richardson, was not allowed to answer (Rec., p. 14) were a material part of an inquiry which, if permitted, would have tended to show what the maximum value of the services of a skilled superintendent would be for doing the work of superintendence alleged in this case to have been done by plaintiff. Mr. Richardson, who had qualified as an expert witness, without objection, would, in answer to these questions, if permitted, state facts, not opinions, based upon his long and intimate knowledge of building operations, not such as to be within the knowledge or experience of the ordinary juror, which facts would have aided the jury in making a reasonable estimate of the value of plaintiff's services; and in giving such evidence the witness would not have usurped or encroached upon the peculiar province of the jury, namely, to fix the amount of the plaintiff's recovery. The jury would then have had some data and basis of fact for the necessary inquiry whether the plaintiff was qualified to perform valuable service as superintendent, as claimed by him, and if so, the value of that service. The form of these questions was not objectionable, it was not necessary to frame hypothetical questions in the inquiry here attempted.

See Enc. Pl. & Pr., vol. 8, p. 764, et seq.

III.

Turning now to the question, "What in your opinion would be the reasonable compensation of a man as superintendent of a building who should spend from half an hour to an hour a day on the building" (Rec., p. 15), the refusal to allow answer, to which is assigned as the third error, it is submitted that it was a fair inference

for counsel to draw from all the testimony on that point that plaintiff's time spent at the building when the men were at work did not average more than from a half hour to an hour per day (Rec., pp. 10–11). A question of this character to an expert witness may be based upon any assumption of facts which the testimony tends to prove according to the theory of the examining counsel.

Enc. of Pl. and Pr., vol. 8, pages 757, 758, and cases cited.

If the witness had been allowed to inform the jury what it would have cost defendants to have employed a skilled superintendent to give that much of his time daily to over-looking the work, they might have arrived at some just and reasonable valuation of the plaintiff's services as to superintendence, allowing less because of his inexperience and lack of technical or practical knowledge than a skilled man would have been entitled to.

IV.

The hypothetical question to the witness Holden quoted in the fourth assignment of error, fairly conforms to the plaintiff's own statement of the time he gave to superintendence of the construction, and an answer thereto would have been admissible and proper evidence for the reasons given in the next foregoing section of this brief. No objection was made that the question was leading, and the objection of counsel and ruling thereon by the court must therefore be taken to have proceeded on the supposed incompetency or irrelevancy of the evidence sought to be adduced thereby.

See—

Jones *vs.* District of Columbia, 21 D. C., 350.
Woodbury *vs.* Dist. of Col., 5 Mackey, 127.
Camden *vs.* Doremus, 3 Howard, 530.
Noonan *vs.* Caledonia Gold Co., 121 U. S., 399.

In substance and effect this question was whether or not to be entitled to the full pay of a superintendent one would be required to spend more time at the building than specified in the question, and it was asked in an attempt to meet and controvert the testimony of Mr. Haller for plaintiff to the effect that in his opinion a superintendent would not have to spend practically all of his time on the building to be entitled to the highest pay or compensation (Rec., p. 12). The witness Holden had just previously testified that superintendents are as a rule paid by the day, at a rate fixed according to the class of the building, and that the rate in the case of a comparatively small building, such as that in question here, would be $5 per day according to his experience (Rec., p. 15).

V.

The jury should have been fully advised of the qualifications of a building superintendent or superintendent of construction, whose duties the plaintiff claimed in this case to have undertaken and performed. Such testimony would have afforded the jury a necessary standard of judgment, and witness Holden having shown that he possessed the experience and knowledge necessary to enlighten the jury on this material point (Rec., pp. 14 and 15), should have been permitted to answer the question referred to in the fifth assignment of error.

VI.

Inquiry of expert witnesses relating to the value of services of one who should obtain releases of mechanics' liens was eminently proper in defending against plaintiff's claim for compensation for that very service. In his bill of particulars (which was read to the jury by his counsel) plaintiff lays emphasis on this item of his claim, and he

testified at length on the same point, but offered no evidence of the value of his services in that behalf, his counsel stating that the jury must be left to estimate the value of the same. The jury doubtless did consider this claim and testimony of plaintiff in regard thereto and included in their verdict *some* amount as compensation therefor. But that amount may have been an excessive and extravagant allowance. The jury must certainly be presumed to have been without either knowledge or experience to guide them in fixing the value of services consisting in procuring a release of liens; while both Richardson and Holden possessed professional and practical knowledge and experience on this very point. Their opinion would have been admissible under the general rule that in matters of value requiring special experience or knowledge not presumably possessed by all the jurors, a witness shown to be particularly qualified by such experience or knowledge may testify to his opinion on a question of fact.

Abbott's Trial Brief on Evidence, 2d Ed., p. 383 and cases cited.

Opinions of expert witnesses as to value of services are admissible but are advisory only, and are to be considered by the jury in connection with their own knowledge and experience and the facts of the case.

Head *vs.* Hargrave, 105 U. S., 46.

VII.

The last assignment of error is the granting over defendants' objection, of the following instruction to the jury as prayed by plaintiff, namely:

> "If you believe the defendants requested the plaintiff to do the work referred to in the evidence then the burden of proof is upon the defendants to show that the plaintiff agreed to do such work without being paid therefor" (Rec., p. 16).

It is submitted that this instruction is erroneous in its reference to the burden of proof, and also in the concluding statement that the defendants must show that the plaintiff agreed to do such work without being paid therefor.

The burden of proof was on plaintiff throughout the trial. This burden was placed upon him by the pleadings and the nature of the case.

> "The general rule is that whoever has the affirmative of the issue as determined by the pleadings, or where there are no pleadings, by the nature of the investigation, has the burden of proof. It never shifts from that party either in civil or criminal cases."
>
> Cyc. title Evidence, vol. 16, page 926, and cases cited.

There was nothing in this case to make it an exception to the general rule. Indeed, the plaintiff's own admissions of want of express authority or employment, etc., made it the more incumbent upon him to sustain the burden of proof.

But the jury were not only instructed erroneously (as contended) on the point of burden of proof, but by the same instruction, were in substance and effect informed that if they believed the defendants requested the plaintiff to do the work, he was entitled to recover unless they found that the plaintiff agreed to do such work without being paid therefor.

This was equivalent to instructing the jury that they must find an agreement, a meeting of the minds of the parties, on the proposition that the plaintiff was to render services *gratis*, and thus disposed of the main defense to the claim (except as to the *amount* of recovery), which defense was not based upon any such agreement but upon the peculiar facts and circumstances in evidence which it

was alleged induced defendants to believe that plaintiff intended to make no charge for his services, including his employment in the office of defendants' real estate agent, his friendship and intimate association with the defendant, Joseph T. Ferry, his failure to keep any account with or against defendants, his failure to inform either of them that he would charge for his services, his delay in making any claim whatsoever against them until after a disagreement or quarrel with Joseph T. Ferry, and his lack of skill and experience in the matter of superintendence. The impression made on the jurors' minds by this brief and easily understood instruction, which was not only read to them, but was referred to and enforced by plaintiff's counsel in his argument, may well have outweighed what was said apparently to the contrary in the instructions given on behalf of defendants, and in the judge's charge. At best it must have confused the jury; and if they considered it at all when making up their verdict, and it must be assumed that they did, its operation upon their minds must have necessarily been to the disadvantage of the defendants. The practical effect of the instruction, if followed by the jury, would be to eliminate from the case what otherwise would have been a serious question, namely, whether the plaintiff was entitled to recover *at all* for his services, as there was of course no contract agreement proved or attempted to be proved whereby plaintiff undertook to render services without charging therefor. For a case in which inconsistent instructions were held ground for reversal see Bank of Metropolis *vs.* New England Bank, 6 Howard, 212.

It is only in case there clearly appears to be or remain no tendency to mislead the jury when an erroneous instruction is taken in connection with all the other instructions and the general charge, that such erroneous instruction will be deemed harmless. District of Colum-

bia *vs.* Haller, 4 App. D. C., 415. In the case at bar it is confidently urged that the tendency of the instruction complained of to mislead the jury was not cured nor removed by the other instructions or by the general charge of the court.

In conclusion, it is urged that the large amount of the verdict in view of the facts and circumstances proved, indicates that the jury were in fact led into error by the exclusion of evidence and the instruction referred to, and that therefore the judgment appealed from should be reversed.

Respectfully submitted.

GEORGE FRANCIS WILLIAMS,
ARTHUR A. BIRNEY,
Attorneys for Appellants.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

MAY 5 - 1908

Henry W. Hodges
Clerk.

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1908.

NO. 1889.

JOSEPH T. FERRY, Et Al.,
Appellants,

vs.

GEORGE HENDERSON,
Appellee.

Appellee's Brief.

CHARLES POE,
Attorney for Appellee.

J. D. MILANS & SONS, LAW PRINTERS, 615 E STREET, N. W., WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1908.

No. 1889.

JOSEPH T. FERRY, ET AL., APPELLANTS,

vs.

GEORGE HENDERSON, APPELLEE.

APPELLEE'S BRIEF.

Statement.

The appellee brought his action of assumpsit against the appellants on July 30th, 1907, and recovered a judgment upon a verdict in his favor for nine hundred dollars, from which this appeal has been prosecuted.

The declaration contains the Common Counts and the claim is for money found to be due him for work and labor done, and for money laid out and expended. The plaintiff's claim is set forth with unusual fullness in his Bill of Particulars (record, page 5), and a good idea of the issues made up can be had from this and the defendants' affidavit of defense (record, page 3).

Exceptions were reserved by the defendants to the refusal of the Court to permit certain questions to be put

to witnesses and to the granting of the second prayer offered by the plaintiff. No exceptions were reserved to the charge by the Court to the Jury.

Argument.

I. The Court was right in granting the plaintiff's second prayer which related to the burden of proof. The case showed that the defendants had asked the plaintiff to perform some service for them. The defense was that the plaintiff was to do this without pay. Manifestly the burden was on the defendants to show such an agreement. Even if it had been error to grant this prayer standing by itself, its meaning was fully explained both by the prayers asked by the defendants and the Court's charge (record, pages 16 and 17).

II. As to the rulings excluding evidence, there is nothing in the record to show that any harm was done by these rulings, even if theoretically erroneous, for no offer of proof or statement of what was expected to be proven was made.

Turner *vs.* American Security Co., 29th Appeals, 460.

De Forrest *vs.* United States, 11 Appeals, 461.

However, in point of fact, the rulings were without error. The first ruling (record, near bottom of page 10) refused to allow defendant to ask plaintiff what salary he received from his employer; clearly this was irrelevant. The second ruling was a refusal to permit the witness Johnston to answer the question "Are you familiar with working plans and specifications" (record, bottom of page 12). The colloquy between Court and Counsel on

page 13 of the record shows that no answer the witness might have given would have shed any light upon the issue. The same may be said of the questions proposed to be asked the witness Richardson and the witness Holden (record, pages 14 and 15) about superintendents of buildings. The question before the jury was not as to the qualifications of a superintendent, but whether the plaintiff had been employed. There was no question as to the satisfactory manner in which the building was erected, everbody agreeing that the building was a success. The witnesses for the defendant had testified that a superintendent would earn so much per day; those for the plaintiff that he would be entitled to a percentage of the cost. That was the sole issue, on this piont. Irrespective of the improper form of the questions there is nothing to show that any damage was done by the Court's action in regard to them.

Turner *vs.* American Security Co., 29th Appeals, 460.

De Forrest *vs.* United States, 11 Appeals, 456-61.

These two witnesses were also asked how much they thought it was worth to obtain signatures to Releases of Mechanics Liens. Of course this was not a proper question. No basis for a witness' opinion was given by it. It might take a minute to get one man's signature while a month's persuasion might be necessary to obtain that of another.

There was no error committed by the trial Court, and it is respectfully submitted that the judgment should be affirmed.

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